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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

WHETHER THE FOURTH AMENDMENT PERMITS LAW ENFORCEMENT OFFICERS TO ARREST SUSPECTS IN THEIR HOMES WHEN NO WARRANT HAS BEEN OBTAINED AND THERE ARE NO EXIGENT CIRCUMSTANCES DEMONSTRATED EXCUSING THE ABSENCE OF AN ARREST WARRANT.

ARGUMENT

In an effort to avoid the jurisdiction of this Court the state suggests that the federal issue was not properly preserved.

The record in support of the Petition includes portions of petitioner's brief filed in the First District Court of Appeal. The federal issue not only was presented to that court by that brief but the Attorney General in its brief conceded that the issue was properly before the court. In its argument in the District Court the state said:

> Although an examination of the record reveals that trial counsel failed to particularize this claim in the fashion as framed on appeal, the allegations in the amended motion ".... the statement was illegally obtained without a warrant ..." and the argument of counsel that "... they had a chance to get a-- to go before a Court and get a warrant which they did not do ..." (TR 121) is probably adequate to present the matter for appellate review. This is particularly true since counsel for the State urged that under Florida Statutes an arrest warrant is not necessary to perfect an arrest where a police officer has probable cause to believe a felony has been committed (TT 133). (State's Brief at 4.)
> (A copy of the state's brief in the District Court is attached as an appendix)

The state did not attempt to transfer jurisdiction of the appeal to the Florida Supreme Court but conceded that the issue was sufficiently raised to "present the matter for appellate review".

The state is complaining here that the federal issue should have been raised by attacking the constitutionality of Section 901.15, Florida Statutes (1975) which permits arrests on probable cause without an arrest warrant. In the trial court the petitioner's counsel raised the Fourth Amendment issue in another way. A motion was filed to suppress petitioner's confession on grounds, among others, that it was obtained "without a warrant". The testimony of one of the arresting officers established that the police made no effort to obtain a warrant. In argument on the motion petitioner's counsel asserted that the police had a chance to go before a court for a warrant but failed to do so.

By the motion to suppress alleging that the statement of petitioner was obtained without a warrant the state was put on notice that the issue of exigent circumstances might arise at the hearing. The state offered no evidence to establish exigent circumstances.

After the motion to suppress had been denied and petitioner convicted, jurisdiction for the appeal lay only in the District Court of Appeal. Article V, Section 4(b)(1), Florida Constitution. The Supreme Court of Florida did not have jurisdiction

because the trial court did not "initially and directly [pass] on the validity of a state statute ....". Article V, Section 3(b)(1), Florida Constitution. A further appeal from the District Court to the Florida Supreme Court, raising a constitutional issue, would not have been permitted. Cf. Silver v. State, 188 So.2d 300 (Fla. 1966).

It is unfortunate that respondent's brief has clouded consideration of the constitutional issue by embroiling this Court needlessly in the intricacies of Florida appellate law. But since respondent has opened this door petitioner must close it to insure consideration of the properly presented constitutional claim.

In State v. Perez, 277 So.2d 778 (Fla. 1973), the Florida Supreme Court reviewed a decision of the Second District Court of Appeal in Perez v. State, 267 So.2d 33, which invalidated a search incident to a warrantless arrest of the defendant at his home. After analyzing this Court's opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Florida Supreme Court concluded that the majority opinion pertaining to the necessity of obtaining an arrest warrant was dicta and therefore refused to "extend the application of Coolidge beyond its actual holding ....". 277 So.2d at 783. The court also said:

> The District Court of Appeal erred in reversing respondent's conviction and discharging respondent on the ground that the arresting officers had ample time to obtain an arrest warrant and erred in qualifying the language of the statute to exclude arrests in dwelling houses in the nighttime. There is no such exception set out in the statute. The arrest of respondent was lawful pursuant to Section 901.15(3), Florida Statutes, F.S.A.
> 277 So.2d at 783

In petitioner's case the same issue arose. Since the Florida Supreme Court had, in 1973, unanimously rejected the argument that a warrant was necessary to arrest a defendant at his home, there was no basis for making that same argument to the same court, especially when there was no intervening

decision to the contrary from this Court. The jurisdiction of the Florida Supreme Court to hear direct appeals from trial courts is limited to review of orders of trial courts "initially and directly" passing on the validity of a statute. Article V, Section 3(b)(1), supra. Had a direct appeal been taken from the trial court to the Florida Supreme Court urging the invalidity of Section 901.15, jurisdiction might not have been accepted because the constitutional issue had already been resolved in Perez. Simmons v. State, 354 So.2d 1211 (Fla. 1978); Daytona Beach Racing and Recreational Facilities District v. Volusia County, 355 So.2d 175 (Fla. 1st DCA 1978); State v. Opitz, 357 So.2d 469 (Fla. 2d DCA 1978). Jurisdiction was accepted by a district court in Opitz even though the trial judge ruled that Section 775.087(2), (Su... 1976), was unconstitutional. The district court said that the Florida Supreme Court had recently ruled that the statute was constitutional in Sowell v. State, 342 So.2d 969 (Fla. 1977), and therefore "the trial court's ruling as to constitutionality is merely colorable and presents no substantial constitutional issue. Therefore, appellate jurisdiction is properly in this court rather than in the Supreme Court." State v. Opitz, supra, 357 So.2d at 470 n. 1.

This holding followed from an earlier decision of the Florida Supreme Court in Massachusetts Bonding and Insurance Co. v. Bryant, 189 So.2d 614, 616 (Fla. 1966), when the court said:

> Although we have held that a decision "initially" passing upon a constitutional question as specified in Section 4 of Article V of the Constitution, F.S.A., applies only to an original such determination in immediate litigation, State v. Furen, 118 So.2d 6 (Fla. 1960), we qualified the statement by restricting its application to like decisions by the same or other District Courts of Appeal. The pronouncement should not be strained to mean that a litigant could challenge the validity of an act which had already been held valid by this court and use that as a vehicle to secure another determination

of the issues of his case under the familiar ruling that once this court assumes jurisdiction, it will consider the entire case, merits and all. (Emphasis added)

For these reasons the petitioner was properly before the First District Court of Appeal with his Fourth Amendment claim.

Of course the Florida Supreme Court could have acquired jurisdiction by certification of the question as being one of great public interest. Article V, Section 3(b)(3), Florida Constitution. This alternative was presented to the District Court in petitioner's reply brief, portions of which are included in the Appendix to this brief. Petitioner presented this point to the District Court as follows:

> Even if this Court is bound by the holding in Perez, it is permissible to certify the question to the Florida Supreme Court as one of great public interest. In Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973) the Supreme Court suggested this procedure, stating:
>
> "This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court."
>
> (Petitioner's Reply Brief at 2)

When the District Court decided the issue, however, it did so on the basis of Perez but without certification of the question. Petitioner then had no avenue to present this issue to the Florida Supreme Court, because there was no conflict between the District Court decision and any other appellate decision on that point of law. The only arguable ground of jurisdiction was the point presented in the petitioner's jurisdictional brief, raising a ground of state law. Petitioner has not tried to mislead this Court, as suggested by respondent, by claiming that the constitutional issue was presented to the Florida Supreme Court. It was not, because there was no colorable jurisdictional claim to make to the Florida Supreme Court. The Florida Supreme Court

does not possess discretionary review of decisions from district courts of appeal. The Supreme Court may review only a decision of a district court that "affects a class of constitutional or state officers that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same question of law ....". Article V, Section 3(b)(3), Florida Constitution.

Petitioner was following state law in presenting his constitutional claim to the First District Court of Appeal rather than the Florida Supreme Court. The presence of a constitutional issue does not automatically vest jurisdiction in the Florida Supreme Court, as was made plain in Dykman v. State, 294 So.2d 633 (Fla. 1974), when the court said:

> The jurisdiction of this Court on direct appeal from an order of a trial court is governed by the provisions of Article V, §3(b)(1) of our constitution. This section provides that the Supreme Court shall hear appeals from final judgments and orders of trial courts "initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution." Although our direct appeals jurisdiction includes cases in which the trial court inherently passes upon the constitutionality of a statute, we may not accept a direct appeal based upon an inherent construction of a constitutional provision; it is insufficient to invoke our direct appeals jurisdiction that there was an inherent construction of a constitutional provision in the judgment appealed from, but rather there must be an express ruling by the trial court which explains, defines, or overtly states a view which eliminates some existing doubt as to a constitutional provision in order to support a direct appeal.[2] Our direct appeals jurisdiction is not properly invoked merely because the trial court may apply a constitutional provision to the facts before it, but rather is properly invoked as to construction of a constitutional provision only where the trial court has expressly construed the constitutional provision involved.[3] With these principles in mind, we shall examine the several issues raised on appeal to determine if our direct appeals jurisdiction has been properly invoked.
>
> Id. at 634,35 (Footnotes omitted)

The issue raised by petitioner in trial and appellate courts was one of interpretation of a provision of the federal constitution. The Florida Supreme Court did not have jurisdiction to hear the appeal nor to consider the decision affirming the conviction by the First District Court of Appeal in the absence of a certificate of great public interest. Petitioner did all that was required under Florida law to preserve and present his federal constitutional claim for adjudication by the highest court in the state having jurisdiction to consider that claim. He should not be denied review in this court because the state disagrees with the manner in which the constitutional issue was presented. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 237 n.1, 19 L.Ed.2d 438, 441 (1967); Williams v. Florida, 399 U.S. 78, 80 n.5, 26 L.Ed. 2d 446, 449 (1970).

Overlooked by respondent is the importance of the issue and the clearcut ruling by the Florida Supreme Court in Perez that a warrant is not necessary to arrest a suspect in the privacy of his home. In attempting to minimize the Perez holding the respondent contends that "Florida law, although authorizing warrantless arrests of persons do [sic] not allow forcible entry into a building, Section 901.19, Florida Statutes ...." (State's response at 7). Contrary to that statement, the cited statute authorizes a peace officer to use "all necessary and reasonable force to enter any building where the person to be arrested is or is reasonably believed to be". The only predicate for the officer's use of this force is first to announce his authority and purpose. This force may be used when the officer is making an arrest either with or without a warrant.

Florida law, therefore, authorizes forcible intrusions into suspect's homes either in the daytime or nighttime without warrants and without exigent circumstances making it impracticable to obtain a warrant. This important issue is appropriately before the Court in this case and should be resolved. Petitioner urges

this Court to issue a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief has been hand delivered to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to the petitioner, Mr. Vincent Anthony Bush, #054109, Cross City Correctional Institution, P. O. Box 1500, Cross City, Florida 32628, this 8th day of December, 1978.

MICHAEL J. MINERVA

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

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VINCENT ANTHONY BUSCH,

APPELLANT,

-VS-

CASE NO. GG-445

STATE OF FLORIDA,

APPELLEE.

BRIEF OF APPELLEE

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

VINCENT ANTHONY BUSCH, *
APPELLANT, *
-*VS*- * CASE NO. GG-445
STATE OF FLORIDA, *
APPELLEE. *

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee accepts the Statement of the Case as stated on page two of Appellant's brief.

STATEMENT OF THE FACTS

Appellee accepts the Statement of the Facts as stated on pages three through ten of Appellant's brief except that portion wherein Appellant states he objected to the court instructing the jury on principals. The objection was not to the giving of the charge but to not reinstructing the jury on the charges (TT 239).

Other facts deemed relevant to a disposition of the issues raised on this appeal will be included in the argument portion of this brief.

POINTS ON APPEAL

POINT I

THE TRIAL JUDGE SHOULD HAVE SUPPRESSED APPELLANT'S CONFESSION BECAUSE IT WAS THE RESULT OF AN ARREST OF THE APPELLANT IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT.

POINT II

THE COURT ERRED BY INSTRUCTING THE JURY THAT APPELLANT COULD BE FOUND GUILTY OF ROBBERY COMMITTED WHILE CARRYING A FIREARM WHEN THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THE FIREARM WAS IN THE POSSESSION OF APPELLANT'S ACCOMPLICE: AND THE JUDGMENT AND SENTENCE FOR ARMED ROBBERY ARE NOT SUPPORTED BY THE EVIDENCE.

POINT I

THE TRIAL JUDGE SHOULD HAVE SUPPRESSED APPELLANT'S CONFESSION BECAUSE IT WAS THE RESULT OF AN ARREST OF THE APPELLANT IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT.

ARGUMENT

Appellant contends the trial judge erred in denying his motion to suppress the confession because the initial arrest was invalid because it was effectuated without an arrest warrant.

Although an examination of the record reveals that trial counsel failed to particularize this claim in the fashion as framed on appeal, the allegations in the amended motion ". . . the statement was illegally obtained without a warrant. . ." and the argument of counsel that ". . . they had a chance to get a--to go before a Court and get a warrant which they did not do. . ." (TR 121) is probably adequate to present the matter for appellate review. This is particularly true since counsel for the State urged that under Florida Statutes an arrest warrant is not necessary to perfect an arrest where a police officer has probable cause to believe a felony has been committed (TT 133).

Of course, even assuming the arrest was illegal because no warrant was secured, that does not mean the confession was not freely and voluntarily given and therefore inadmissible, and contrary to Appellant's claim *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed.2d 416 (1975) does not so hold. In *Brown*, supra, the Supreme Court rejected the notion that Miranda warnings alone would automatically purge the taint of an illegal arrest[1], but nonetheless held:

> ". . . It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. . . ." 422 U.S. at 603

The Supreme Court in *Brown* rejected the notion that the Miranda warnings *alone* and per se removed the taint of the primary illegality *but* it also rejected the "but for" rule as well, and held each case had to be decided on its own facts.

There is *nothing* in the record before the trial judge that the statement was induced as a result of the illegal arrest, and holding that suppression was required would be an application of the "but for" rule rejected in *Brown*, supra. Indeed,

---

[1] The arrest was found to be without probable cause by the Illinois Supreme Court.

the *uncontradicted* testimony was that it was given freely and voluntarily after Appellant was warned of his rights and indicated he understood those rights (TT 98,101,105, Exhibit A), and the trial judge expressly found the statement was freely and voluntarily given (TT 134). Even Appellant's testimony supports the finding that his statement was given freely and volunitarily.

In *Brown* the testimony established that the illegality of the arrest was purposeful by the officers and the impropriety thereof was obvious. Moreover, the court found the arrest was purely investigatory. In this case the arrest was lawful as far as the officers were concerned based upon *State v. Perez*, 277 So.2d 778 (Fla. 1973), *cert.denied* 38 L.Ed.2d 468 (1973), and there is no testimony that it was purely for investigative purposes. Consequently, there is is a factual basis before the trial judge from which she could reasonably have found the statement was the result of a voluntary exercise of free will and independent of the illegal arrest, *assuming* the arrest was illegal. *Jetmore v. State*, 275 So.2d 61 (Fla.4th DCA 1973).

Appellant, citing to a host of decisions rendered by the United States Supreme Court which declined to answer the issue, e.g., *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Santana*, 427 U.S. 38 (1976); and *Coolidge v.*

New Hampshire, 403 U.S. 443 (1971), contends the arrest was illegal.

The Florida Supreme Court in *State v. Perez*, supra, rejected the very argument advanced herein notwithstanding *Coolidge v. New Hampshire* and the implications thereof. The Court did so on the basis of Section 901.15, Fla.Stat., which authorizes an arrest without a warrant if an officer has probable cause to believe a felony has been committed and the person to be arrested has committed it. The Court said:

> "Section 901.15, Florida Statutes, F.S.A., does not say that the arrest thereby authorized cannot be made in the arrested person's home in the nighttime without a warrant if the officer had opportunity to obtain a warrant.
>
> "The Supreme Court of the United States has opined that absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest. Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L. Ed. 1663 (1948), United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950).
>
> "We recognize that the Supreme Court of the United States in the majority opinion written in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in an attempt to refute Justice White's dissent therein did discuss as obiter dicta, the necessity for warrants in general both in the case of arrests and in the case of search and seizure. However, in *Coolidge*, there was no question as to the validity of the arrest of defendant in his home on the charge of murder, but rather the case turned upon whether there had been a lawful search and seizure of petitioner's automobile since the warrant for the search and seizure of his automobile did not satisfy the requirements of the Fourth Amendment--whether a warrantless search was justifiable under the given circumstances of the case. That court explicated that the basic constitutional rule is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate,

are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions [citing Katz v. United States, 389 U.S. 347, at 357, 88 S.Ct. 507, 19 L. Ed.2d 576]. The exceptions are "jealously and carefully drawn" and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."' considering the three theories proposed by the state to bring the search of the automobile within one or another of the exceptions to the warrant requirement, the court discounted all three theories and found that the seizure of the car in the driveway could not be justified as incidental to the arrest which took place inside the house, that the argument of the state to the effect that police may make a warrantless search of an automobile whenever they have probable cause to do so was without merit since the police for some time had known of the probable role of the car, the petitioner had had ample time to destroy incriminating evidence, the house was guarded, and petitioner had no access to the car--hence, there were no exigent circumstances justifying a warrantless search. As to the third theory of the state that the car itself was an instrumentality of the crime and as such might be seized because it was in plain view, the court responded that under the circumstances present in *Coolidge*, the plain view exception could not justify the seizure of defendant's automobile. With regard to this position by the state, the court explicated, inter alia,

> 'The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves.'

"Subsequent to deciding the issue before it as above explained, the majority in an attempt to refute Justice White's dissent went into a lengthy discourse on warrants in general. It is in this section of the opinion that the court discussed warrantless arrests. Justice Harlan points out in his concurring opinion that the court again leaves open the issue of a warrantless entry into a man's home to arrest him on probable cause.

"The Supreme Court posited a question similar to the one before us in the following language, at 480, 91 S.Ct. at 2045,

> 'Indeed, if Mr. *Justice White* is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption. Such a re-examination "would confront us with a grave constitutional question, namely, whether the *forceful* nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." Jones v. United States, 357 U.S. at 499-500, 78 S.Ct. [1253], at 1257 [2 L.Ed.2d 1514].' (Emphasis supplied.)

and replied to this proposition as follows,

> 'None of the cases cited by Mr. *Justice White* disposes of this "grave constitutional question." The case of Warden v. Hayden [387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782], supra, where the Court elaborated a "hot pursuit" justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances. . . . *But we find it unnecessary to decide the question in this case.* The rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." [Katz v. United States, supra] is not so frail that its continuing vitality depends on the fate of a supposed doctrine of warrantless arrest.' (Emphasis supplied.) at pp. 480-481, 91 S.Ct. at pp. 2045-2046.

> "We will not extend the application of *Coolidge* beyond its actual holding, and we are by no means persuaded that the position we took in *Falcon*, and the reasoning upon which it was based, are no longer valid." 277 So.2d at 781-783

See also: *Collins v. State*, 310 So.2d 33 (Fla.2d DCA 1975).

State v. Perez, supra, is controlling precedent and this Court is bound to follow the case law set forth by that decision, *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), in the absence of a definitive holding to the contrary by the Florida Supreme Court or the United States Supreme Court. Of course, Appellant has acknowledged that the Supreme Court has not rendered such a holding and *State v. Perez* supra, has not been overruled.

It should be understood that this was not a nighttime or forceful entry into the home, such as existed in *Jones v. United States*, 357 U.S. 493 (1958), which involved a warrantless search and seizure. The officers in question knocked on the door, identified themselves and were admitted into the home at approximately 11:00 a.m. (TT 95).

Appellant's claim that the United States Supreme Court "will" hold warrantless arrests invalid is nothing more than speculation as to what the Court will do in the future. Justice White's opinion in *Watson* which traces the history of warrantless arrests is a strong case to the contrary. Consequently, Appellee will not speculate on what that Court will or will not do in some future case. The point is that the existing law is that the trial judge was correct in rejecting the argument that the arrest was illegal. Since the arrest was lawful under the statutes and decisional law of the State of Florida, there was no primary illegality that could taint the

Appellant's otherwise free and voluntary confession and the trial judge properly denied the motion to suppress.

Appellant implies that there was an absence of probable cause but really doesn't argue the matter (App's brief at 35). The fact that the "informer", who was actually Johnny Winters (TT 116), took the Fifth Amendment at trial has nothing to do with his reliability at the time he gave the information to Detectives Kearney and Bradley. The ". . . floundering testimony of Officer Terry. . ." (App's brief at 35) made it clear that Winters had confessed to his participation in the robbery and implicated Appellant (TT 120). It is therefore apparent that sufficient reliability existed since Winter's statements constituted admissions against penal interest. *United States v. Harris*, 403 U.S. 573 (1971); *State v. Jacobs*, 320 So.2d 45 (Fla.2d DCA 1975). Inasmuch as Winters confessed to committing the robbery, it is obvious that he had personal knowledge of what he spoke and the "two pronged" test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) were met. Interestingly, when asked on cross-examination whether he thought Winters was reliable, Officer Terry said: ". . . The only thing I could say is if he had knowledge of the crime and could put this man in the crime, then I would say he would be reliable. . . ." (TT 118) Obviously the trial judge agreed with Officer Terry's "floundering testimony", and Appellant has not demonstrated that he erred in doing so. Indeed, he has not even attempted to do so except by saying

the officers should have had the probable cause determined before they arrested him, not afterwards.

The warrantless arrest was reasonable under the circumstances of this case and the fact that they could have secured a warrant but did not, does not render the arrest invalid. *State v. Perez*, supra.

POINT II

THE COURT ERRED BY INSTRUCTING THE JURY THAT APPELLANT COULD BE FOUND GUILTY OF ROBBERY COMMITTED WHILE CARRYING A FIREARM WHEN THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THE FIREARM WAS IN THE POSSESSION OF APPELLANT'S ACCOMPLICE; AND THE JUDGMENT AND SENTENCE FOR ARMED ROBBERY ARE NOT SUPPORTED BY THE EVIDENCE.

ARGUMENT

Appellant, relying upon *Earnest v. State*, ___ So.2d ___ (Fla. 1977), Case No. 51,491, Opinion filed August 31, 1977, rehearing pending, contends the verdict and sentence entered thereon are not supported by the evidence because Johnny Winters was the person who was armed with the firearm during the robbery and the evidence does not show that he was personally armed.

Appellee agrees there is absolutely no evidence to show Appellant was armed and thus his role was limited to tying up the victims in the back room and collecting the money from Ms. Cotes (TT 154-155). Appellee respectfully suggests, however, that *Earnest* does not apply herein, because Appellant was not sentenced to three years mandatory imprisonment for "possession" of a firearm pursuant to Section 775.087 (2), Fla.Stat., which is what was involved in *Earnest*.

The jury was properly instructed pursuant to §777.011, Fla.Stat., which provides:

> Principal in first degree.--Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids,abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

The evidence shows that Appellant did several overt acts in aiding Winters in the commission of the *armed* robbery and there is absolutely nothing in *Earnest* to suggest §777.011 does not apply to a prosecution under Section 812.13, Fla.Stat. Indeed, if §777.011 does not apply, how could Appellant be guilty of unarmed robbery, as he suggests, for there is nothing in the record to show he threatened or coerced Ms. Cotes to turn over the money to him? The truth of the matter is that Appellant is guilty of armed robbery--absent a jury pardon--or he is not guilty of anything because he could only be guilty as an aider and abettor to Winters and the uncontradicted testimony is that Winters was armed. That this is correct, this Court need only look to the fact that in *Earnest* the appellant was in fact convicted for "armed robbery" even though she did not have possession of the firearm.

Under Section 812.13 a person cannot be convicted of just "robbery", he or she must be convicted of either robbery with a firearm or deadly weapon; robbery with a weapon or robbery

without a firearm or weapon. Since Appellant did not exert any force or threaten Ms. Cotes, he could only be convicted as an aider or abettor to Winters. Since Winters was armed, Appellant could be charged, convicted and punished to the same degree as Winters, except with regard to the three-year minimum mandatory sentence.

While the Supreme Court felt there was a doubt that the Legislature intended to apply the aiding and abetting statute to Section 775.087(2), Fla.Stat., which is a special *sentencing* statute, that does not suggest that there is any question that the Legislature intended the aiding and abetting statute to apply to the robbery statute, which is a *substantive crime* and not simply a sentencing statute. Indeed, Section 777.011 applies to all substantive crimes by its very terms for it states ". . . whoever commits *any criminal offense. . .*" or aids or abets the commission of such offense may be charged, convicted, and punished as a principal in the first degree.

Chapola v. State, 347 So.2d 762 (Fla.1st DCA 1977), has nothing to do with this case for the Appellant was charged with armed robbery (R 1). In *Chapola*, the appellant was merely charged with robbery without alleging the type of robbery.

The judge properly instructed the jury on principals--to which Appellant did not object other than that the whole charges should have been given (TT 239)--and the evidence supports the verdict.

CONCLUSION

For the reasons stated hereinabove, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to Michael J. Minerva, Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 8th day of December, 1977.

Raymond L. Marky
Raymond L. Marky
Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

VINCENT ANTHONY BUSCH,

Appellant;

v. CASE NO. GG-445

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

MICHAEL J. MINERVA
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IN THE DISTRICT COURT OF APPEAL
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VINCENT ANTHONY BUSCH, :

Appellant, :

v. : CASE NO. GG-445

STATE OF FLORIDA, :

Appellee. :

REPLY BRIEF OF APPELLANT

I ARGUMENT

POINT I

WHETHER THE TRIAL JUDGE SHOULD HAVE SUPPRESSED THE APPELLANT'S CONFESSION BECAUSE IT WAS THE RESULT OF AN ARREST OF THE APPELLANT IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT (This point arises from assignment of error no. 5).

The appellant recognizes that the decision of the Florida Supreme Court in State v. Perez, 277 So.2d 778 (Fla. 1973) is currently the law in this state. However it is appellant's position that an authoritative construction of the Fourth Amendment by the United States Constitution is yet to be made on this subject and that in order to preserve this issue it is necessary that the appellant assert

this position in this Court. The State has graciously conceded that the issue was raised in the trial court so it is properly presented here.

Even if this Court is bound by the holding in Perez, it is permissible to certify the question to the Florida Supreme Court as one of great public interest. In Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973) the Supreme Court suggested this procedure, stating:

> "This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court."

It is appellant's position, therefore, that the ultimate authority on the issue raised here will be the Supreme Court of the United States pursuant to the authority vested in it under Article VI, Paragraph 2 (The Supremacy Clause) and the Fourth Amendment of the United States Constitution made applicable to the states through the Fourteenth. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081 (1961).

The State has also raised the issue of whether the confession would have been admissible, even if the arrest was illegal, because it was not the product of illegal custody. Appellant challenges this contention and asserts

that because the statement was made within a short period of time after the arrest, and there was no evidence that any outside influence purged the taint of the illegal custody, the ensuing statement was tainted.

The conduct of the police in this case in invading the appellant's home without first attempting to seek permission from a magistrate is a sufficient Fourth Amendment violation to bring this case within the rule of Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975).

POINT II

WHETHER THE COURT ERRED BY INSTRUCTING THE JURY THAT THE APPELLANT COULD BE FOUND GUILTY OF ROBBERY COMMITTED WHILE CARRYING A FIREARM WHEN THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THE FIREARM WAS IN THE POSSESSION OF THE APPELLANT'S ACCOMPLICE; AND WHETHER THE JUDGMENT AND SENENTCE FOR ARMED ROBBERY ARE SUPPORTED BY THE EVIDENCE (This point arises from assignments of error numbered 1,2,3,4, and supplemental assignments of error numbered 1 and 2).

Appellant disagrees with the State's contention on page 2 of its brief that appellant's counsel did not object to the giving of the charge, but rather objected to not reinstructing the jury on all charges.

The entire colloquy from pages 235 through 239 of the transcript indicates that appellant's counsel took the position that unless the court reinstructed the jury on the entire charges, it would be error to give the instruction on principals alone. After the court had given the single instruction appellant's counsel clarified his position, with which the court agreed, stating:

> "Your Honor, just for the record, I will object to the charge as given, that it pinpoints something that -- the whole charge should have been given or the jury instructed to reach a verdict if they can with the law that they had." (Emphasis added) (TR-239).

Therefore, the appellant's counsel did object to the instruction as given.

The State does not directly refute appellant's argument that the accomplice instruction was inapplicable and the evidence insufficient as to armed robbery. Rather the State attempts to limit the Supreme Court's decision (now final) in Earnest v. State, _____ So.2d _____ (Fla. 1977) Case No. 51,491, rehearing denied December 6, 1977, to apply only to a sentencing statute.

Appellee disagrees because; (1) there is no legal basis for making this distinction, and the Supreme Court did not restrict its language in that manner; (2) the Court's decision strictly construing Section 775.087(2) in Earnest rested upon its earlier holding in State v. Wershow, 343 So.2d 609 (Fla. 1977) declaring a substantive (not sentencing) statute void for vagueness and (3) the robbery statute under consideration is also, in effect, a sentencing statute.

To explain the third reason, appellant notes that robbery is now defined and prohibited as follows:

> "(1) 'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.
>
> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) An act shall be deemed 'in the course of committing the robbery' if it occurs in an attempt to commit robbery or in flight after the attempt or commission." Section 812.13, Florida Statutes (1975).

The substantive offense is defined in subsection (1). The penalty is dependent upon what is "carried" by "the offender".

It is not a destruction of the statute for principals in the same robbery to be subject to different degrees of punishment, according to whether they personally "carried" some weapon. Indeed, this construction is in harmony with, if not mandated by, the holding in Earnest.

The State's argument that Section 777.011, relating to principals, requires that all participants be punished equally, is indirectly refuted by State v. Dixon, 283 So.2d 1, 11 (Fla. 1973) when the Court construed almost identical language in an earlier version of the statute and said:

". . .Fla. Stat. &776.011, F.S.A., provides,

> 'Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense.'

The effect of this law was that the traditional definitions of principal in the first degree, principal in the second degree, and accessory before the fact were all combined within the statutory definition of principal in the first degree in Fla. Stat. § 776.011, F.S.A., and in the repealed Fla. Stat. §782.04, F.S.A.

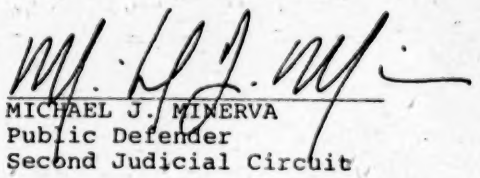
The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree." 283 So.2d at 11.

It is equally obvious that the Legislature had the same intent when enacting the new robbery statute; that the principal theory would not apply to the penalty provisions. At least there is ambiguity here, and under Earnest the appellant is entitled to the benefit of the doubt.

The State has agreed there was no evidence that appellant was armed (State's brief at 13). Thus, his participation in the acts constituting robbery, as defined under Section 812.13(1), was sufficient to establish guilt, either as an aider and abettor, or as a principal in the first degree (tying up victims and taking money). But, as to the degree of guilt, appellant's culpability was limited to a felony of the second degree under Section 812.13(2)(c) because he was an "offender [who] carried no firearm, deadly weapon, or other weapon. . . ."

The error in giving the instruction on principals, especially pertaining to guilt of armed robbery, was aggravated by the isolated charge given in response to the jurors' specific question on this point. The evidence supported neither the instruction nor the verdict and reversal is required.

Respectfully submitted,



MICHAEL J. MINERVA
Public Defender
Second Judicial Circuit

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been hand delivered to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, Mr. Vincent Anthony Busch, #054109, Cross City, Correctional Institution, P.O. Box 1500, Cross City, FL 32628, this 12th day of December, 1977.

MICHAEL J. MINERVA